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No. 07-1351

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IN THE

Supreme Court of the United States

MOSHE TAL, INDIVIDUALLY,
TAL TECHNOLOGIES, INC. and
TS FAMILY LIMITED PARTNERSHIP,

Petitioners,

v.

DCR FUND I, L.L.C., BANK ONE, N.A. and
BRIDGEVIEW BANK

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DCR FUND I, L.L.C. AND BRIDGEVIEW BANK

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. The Orders denying Mr. Tal the right to join BGE as a party were correct and can only be reviewed for an abuse of discretion.

2. May a non-attorney represent a corporation or partnership in litigation as the attorney at law?

3. Whether the Tenth Circuit Court of Appeals properly applied Oklahoma Law in determining that the Petitioner's assertion of an executed oral agreement had not been established as a matter of law and/or fact?

RULE 29.6 DISCLOSURE

The corporate respondent DCR Fund I, L.L.C. is a non-governmental corporation with no parent or publicly held company owning ten percent or more of the corporation stock.

The corporate respondent Bridgeview Bank n/k/a Oklahoma Fidelity Bank is a non- governmental corporation with no parent or publicly held company owning ten percent or more of its corporate stock.

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STATEMENT

DCR Fund I, L.L.C. and Bridgeview Bank ("Joint Respondents") have reviewed the Petitioners' Statement presented in the Petition for Writ of Certiorari ("Petition"). For the sake of brevity the Joint Respondents do not wish to quibble over any minor misstatements of fact; however, it must be noted that the Statement section of the Petitioners' brief presents the Petitioners' allegations and not the facts as determined by the Western District of Oklahoma ("District Court") or by the Tenth Circuit Court of Appeals ("Tenth Circuit") and should be taken with a grain of salt. For example, the Petitioners assert, on page 12 of their Petition, that "Bank One agreed that for a payment . . . Bank One would defer from collecting loan payments by [Tal Technologies, Inc.] until the condemnation and related litigation concluded and the loan's balance plus accrued interest was paid out of the resulting judgment." In fact, as the District Court noted in its December 6, 2004 Order, "[t]he parties hotly dispute whether this oral agreement [between Bank One and the Petitioner Tal] ever existed." Additionally, both the District Court and the Tenth Circuit acknowledged that the Petitioners failed to produce any evidence to demonstrate that the alleged oral agreement was fully executed. *See Infra*, Proposition 3. To the extent that additional misstatements or factually unsupported assertions are made, and in the unlikely event that Certiorari is granted, the Joint Respondents request that the Court take nothing from the assertions made by the Petitioners and that any direct objection by the Joint Respondents to the particular assertions of the Petitioners not be waived pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

Proposition 1 Certiorari Should Be Denied Because Petitioners Have Failed to Demonstrate an Abuse of Discretion in the Trial Court's Orders Denying Mr. Tal the Right to Assert BGE Claims

Petitioners allege that the Tenth Circuit improperly relied upon *Rooker-Feldman* to affirm the District Court's refusal to add BGE as a third party plaintiff to pursue state court claims against Bridgeview for conversion, tortious interference, unlawful foreclosure, abuse of process, and conspiracy.

The Tenth Circuit's reference to *Rooker-Feldman* was nothing more than *obiter dictum* intended to lend further support for the District Court's ruling. The Tenth Circuit's opinion, in pertinent part, stated:

> In its December 6, 2004, order, the district court dismissed those claims for the same reasons it denied Mr. Tal's request for injunctive relief, concluding that it had no jurisdiction over claims relating to the BGE property. Defendants appeal both the denial of injunctive relief and the dismissal of their cross-claims. Instead of addressing the district court's jurisdictional analysis, however, they primarily challenge the court's evidentiary rulings and focus on reasons why they believe the BGE sale was unlawful. **We need not address those arguments because the district court was correct with respect to its jurisdiction.** We also fail to see how any claims challenging a foreclosure sale that the

> state court allowed to proceed could pass muster under either the *Younger* abstention or *Rooker-Feldman* doctrines. We therefore affirm both the district court's denial of injunctive relief and its dismissal of claims arising out of Bridgeview's sale of the BGE property.

(*See* Petition at 15a.) (emphasis added)

As to matters within the discretion of the trial court, appellate review is limited to the question of whether there has been an abuse of discretion. *See* 36 C.J.S. *Federal Courts* § 615. A trial court's ruling on intervention, joinder, misjoinder, amendments to pleadings, intervention, substitution, impleader, and other rulings with respect to parties, process, and pleadings are all within the trial court's discretion. *Gabriel v. Standard Fruit and Steamship Company*, 448 F.2d 724 (5th Cir. 1971); *Schiller v. Physicians Resource Group, Inc.*, 342 F.3d 563 (5th Cir. 2003); *Matter of Covington Grain Co., Inc.*, 638 F.2d 1357 (5th Cir. 1981); and *General Electric Company v. Irvin*, 274 F.2d 175 (6th Cir. 1960). The same standard of review applies to an order denying an injunction. *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 93 S. Ct. 1, 409 U.S. 1207, 34 L. Ed 21 (1972).

The Petitioners' attempts to join BGE so that they could assert claims arising out of the nonjudicial foreclosure of the BGE property were ruled upon by the District Court on four (4) occasions: (a) Order issued October 27, 2003, Aplt. Appl. Vol. 2 at 667-661; (b) Order

issued May 17, 2004, Aplt. App. Vol. 5 at 1972-1980; (c) Order issued November 10, 2004, Aplt. App. Vol. 8 at 3078-3082; and (d) Order issued December 6, 2004, Aplt. App. Vol. 9 at 3176-3195. The Order of May 17, 2004 stated:

> In this case, the court has original jurisdiction — based on diversity jurisdiction — over DCR's claim regarding the TTI note and mortgage. Tal seeks to interpose state law claims against non-diverse defendants regarding a different loan, made by a different bank, at a different time, and secured by different real property. The claims that Tal seeks to raise are simply not so related to the DCR case that they are part of the same case or controversy. Furthermore, the values of judicial economy, convenience, fairness, and comity do not compel the court's exercise of supplemental jurisdiction over these claims as they are currently being litigated in state court. Aplt. App. Vol.5 at 1978-79.

Aplt. App. Vol 5 at 1972-1980.

The Petitioners have provided no argument or authority to show the District Court abused its discretion in denying Mr. Tal's requests. On the contrary, the record demonstrates a sound basis for both the District Court and Tenth Circuit rulings.

Proposition 2 Certiorari Should be Denied Because the Law is Clear that a Corporation May Only Appear in Federal Court Through Licensed Legal Counsel.

The Petitioners' second question presented in the Petition asks whether a principal shareholder of a corporation who is not an attorney at law may, under federal law, represent the corporate entity in federal court in a *pro se* like status. Despite the fact that: (1) federal law is quite clear on this matter; (2) the unchallenged Tenth Circuit decision in *Tal, et al. v. Hogan, et al.*, 453 F.3d 1244 (10th Cir. 2006), addressed this same issue; and (3) neither the Petitioners nor the record provide any evidence demonstrating that Tal Technologies, Inc. and TS Family Limited Partnership (Collectively referred to as the "Corporate Petitioners") were prejudiced by the requirement to have licensed counsel, the Petitioners contend that "[a]s a matter of constitutional law and federal procedure, the court of appeals was wrong" to "den[y Tal] the opportunity to personally represent TTI and TSFLP (or BGE) in this action[.]" Such assertion is without merit. In fact, despite such assertion, Petitioners fail to provide any support for the proposition that the Tenth Circuit violated constitutional law.

The rule against *pro se* representation by corporations is unambiguous and venerable. "It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. California Men's*

Colony, 506 U.S. 194, 201-02, 113 S. Ct. 716, 721, 121 L. Ed. 2d 656 (1993); citing *Osborn v. President of Bank of United States*, 22 U.S. 738, 829, 6 L. Ed. 204 (1824) (holding "[i]t is admitted that a corporation can only appear by attorney"). Clearly this issue has been long resolved by this Court. In fact, the Rules of the Supreme Court of the United States implicitly, if not explicitly, adopt and reinforce this rule when it states that "[n]ames of **persons** other than attorneys admitted to a state bar may not be listed [as counsel of record or on the cover sheet of the any brief], unless the party is appearing *pro se*[.]" (emphasis added). Rule 34(1)(f). Inasmuch as the legal definition of the word "person" does not include a corporation or partnership, this Court has prohibited a non-attorney from acting as counsel of record, or even being listed on the cover page.

The Tenth Circuit has followed the Supreme Court precedent as required. In *Flora Construction Co. v. Fireman's Fund Ins. Co.*, 307 F.2d 413, 414 (10th Cir. 1962), the Court applied the "well established" rule that "a corporation can appear in a court of record only by an attorney at law." Indeed, the *Flora Construction* Court rejected the notion that the Petitioners press here that a corporation's president, who is not a lawyer, has the capacity to speak in court on behalf of a corporation. *Id.*, at 413-14 (citing a plethora of authority from this Court to state court decisions). The Tenth Circuit has reaffirmed this principle repeatedly over the last several decades. *See Harrison v. Wahatoyas, LLC*, 253 F.3d 552, 556 (10th Cir. 2001) ("[A] corporation or other business entity can only appear in court through an attorney and not through a non-attorney corporate officer appearing *pro se*."); *DeVilliers v. Atlas Corp.*, 360 F.2d 292, 294

(10th Cir. 1966) ("[A] corporation can appear in a court of record only by an attorney at law.").

The Petitioners assert that an exception is provided pursuant to *U.S. PolyCon Corp. v. United States of America*, 43 Fed. Cl. 11 (1999), as well as several other cases. Unfortunately for the Petitioners, it is clear that the underlying rationale of *PolyCon* has been rejected and reversed on appeal by the United States Court of Appeals Federal Circuit in *Talasila, Inc. v. United States*, 240 F.3d 1064 (Fed. Cir. 2001). While *PolyCon* granted a similar exception as that requested by the Petitioners, the United States Court of Appeals Federal Circuit has effectively overruled the United States Court of Federal Claims' determination with regard to such exception. In doing so, the United States Court of Appeals Federal Circuit specifically rejected the *PolyCon* exception. *PolyCon* is no longer good authority and may not be relied upon by the Petitioners.

More importantly, the United States Court of Appeals Federal Circuit specifically noted that the law was clear and unqualified that a corporation could not be represented *pro se*, but could only be represented by counsel. In *Talasila*, the Court noted that this determination carried in effect the law as it had been for the better part of two centuries as noted in *Rowland, supra.*

Moreover, the Petitioners' reliance upon *Matter of Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (E.D.N.Y. 1976), *aff'd*, 614 F.2d 1287 (2d Cir. 1979) is also misguided as this Court has explicitly rejected any inference that corporations may represent themselves *pro se* based on

the *Holliday's Tax Services* decision, calling it aberrant. *See Rowland*, 506 U.S. at 203 n.5. Furthermore, the remaining cases cited by the Petitioners, most of which are state law cases which are inapplicable to federal law, fail to establish that the Tenth Circuit committed reversible error. In fact, it is quite the opposite in that the remaining cases cited by the Petitioners either reinforce the Tenth Circuit's decision or suggest that it is within the discretion of the court to determine if a corporation may be represented by a non-lawyer. In either event, the Petitioners have failed to submit a valid question for which *certiorari* could be granted.

It should also be noted that the Petitioners contend that Petitioner Moshe Tal ("Petitioner Tal") has a constitutional right to represent the Corporate Petitioners, as opposed to the Corporate Petitioners' right to be free from the requirement to obtain licensed legal counsel in the event of litigation. As there is no constitutional right to represent a third party in a legal proceeding, Certiorari must be denied. Even if the Court were to re-frame the question, it cannot be argued that the Corporate Petitioners have a right to circumvent the legal counsel requirement.

The rule requiring corporations litigating in federal court to appear through legal counsel is simple. There are certainly no reasons for an exception in this matter as the Petitioners have failed to demonstrate a reason for this Court to deviate from its established precedent. Additionally, the Petitioners' question and analysis fail to acknowledge that the corporate structure, complete with all of the benefits and protections, was the choice of Petitioner Tal. To grant Petitioner Tal the benefits

and protections of Corporate status, while relieving him of the regulations and restrictions associated therewith would only serve to obfuscate the difference between a sole proprietor and a corporation and circumvent Oklahoma's Corporation Code and public policy. Therefore, Petitioner Tal's question for certiorari requesting to appear *pro se* and litigate corporate claims on behalf of the Corporate Petitioners should not be considered.

Proposition 3 Certiorari Should be Denied Because The Tenth Circuit Properly Applied Oklahoma Law Pursuant to the Erie Doctrine When It Determined that the Loan Agreement was not Modified.

In the Petitioners' Petition the third and final question urges this Court to grant Certiorari on the ground that the Tenth Circuit failed to apply Oklahoma Law in violation of the Erie Doctrine established in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct 817, 82 L. Ed. 1188 (1938). Nothing could be further from the truth. In fact, a cursory reading of the Petition and the Tenth Circuit's Opinion clearly demonstrates: (1) that the Petitioners grossly misrepresent the Tenth Circuit's ruling, and; (2) that the Tenth Circuit properly applied Oklahoma Law to the facts of the case.

A. Petitioner Misstates the Tenth Circuit's ruling

"[The Tenth Circuit] reasoned that based on the parties' summary judgment materials, Bank One and [Petitioner] Tal could not as a matter of law modify their written loan agreement by their conduct to create an executed agreement under which the [P]etitioners were not in default." *See* Petition at 28, 29. Aside from the fact that such an assertion assumes that Petitioner Tal and Bank One entered into an executed agreement, a fact contradicted by the District Court and the Tenth Circuit, such assertion claims that the Tenth Circuit ruled that the law does not allow for a modification by executed agreement. As the Court can see from the Tenth Circuit's ruling, *See* Petition at 12a through 15a, the Tenth Circuit's ruling accurately applies Oklahoma law to the facts of the case and finds that the law allowing modification by executed oral agreement "is inapplicable to facts of this case." In fact, the Tenth Circuit's ruling specifically and directly applies Oklahoma law when it held that the "asserted defenses based on the oral agreements were conclusively barred by Oklahoma statute." *See* Petition at 12a. In other words, far from ruling that Petitioner Tal **could not as a matter of law** modify their written loan agreement, as Petitioners suggest, the Court found that Petitioner Tal **did not, as a matter of law and fact,** modify the loan agreement. Contrary to the assertion of the Petitioners, Oklahoma law was applied.

B. The Tenth Circuit Properly Applied Oklahoma Law to the Facts of the Case.

I. The Alleged Oral Modifications Are Not Binding Pursuant to the Terms of the Contract and Oklahoma Law.

The Petitioners have maintained in the District Court, as well as the Tenth Circuit, that the agreement, valued at over $15,000.00, was modified by an oral agreement pursuant to 15 O.S. 2001, § 237. The Petitioners claimed that the alleged oral modification of the credit agreement is a valid modification because the alleged modification had been executed. While it is true that Section 237 allows written contracts to be modified by fully executed oral agreements, such statement does not help the Petitioners.

The Petitioners contend that, pursuant to 15 O.S. 2001, § 237, Oklahoma statutory law permits a written contract to be modified by an executed oral agreement. Such statement of law is not disputed by the Tenth Circuit; to the contrary the statement of law was embraced by the Tenth Circuit. Unfortunately for the Petitioners, in order to establish an oral agreement sufficient to modify a written contract under Oklahoma law, the terms of the oral agreement must have been fully executed. *Dewberry v. Universal C.I.T. Credit Corporation*, 415 P.2d 978, 979 (Okla. 1966). Furthermore, the facts demonstrating and establishing a executed oral agreement must be established by clear and convincing evidence. *Black v. Silver*, 274 P. 886 (Okla. 1928); *See also Dewberry, supra.* The Tenth Circuit found that the Petitioners were unable to prove that

the modification had been executed by clear and convincing evidence:

> The district court in this case held that '[g]iven [the] lack of evidence, it [was] not at all apparent that the [Petitioners] could prove by clear and convincing evidence the existence of an executed oral agreement to defer payment'. . . .Our own review of the parties' summary judgment papers revealed nothing that would cause us to disagree with this assessment.

See Petition at 14a. Moreover, the Tenth Circuit further found that it was "undisputed" that the alleged oral agreements were "never fully executed" as required under Oklahoma law, and therefore the alleged oral agreement could not operate to alter the terms of the loan agreement.

Consequently, the ruling of the Tenth Circuit is not what the Petitioner suggests, and furthermore, appropriately applies Oklahoma law.

CONCLUSION

Based on the above, The Petition for Writ of Certiorari should be and must be denied.

Respectfully submitted,

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